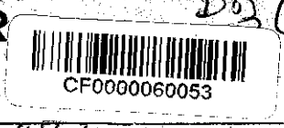
(11) C.J.P.R./9.94 — CrA -2731/98 (2)

APPEAL OF PRISONER

D2 (m)



No 1379/58 Name श्यामकुमार

Father's name सोपनराम खैरवार जशपुर नगर (म.प्र.)

Residence धारा उपर मा.द.वि. Age 27 वर्ष

Sentenced to आजीवन कारावास on 30.10.98

Under Section _____ by अति. सत्र न्यायाधीश श्री.पी.के. तिवारी. जशपुरनगर (म.प्र.)

It is explained to the prisoner that if he states he wishes to be represented by a legal practitioner the appellate Court will not proceed with the case for seven days unless the legal practitioner appears earlier. If the legal practitioner does not appear within seven days he may not heard at all if the Prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to my legal practitioner who should appear.

1 Date of Application for copy of Judgement _____

2 Date on which copy received _____

3 Date on which Appeal sent 13.11.98

4 Whether the prisoner wishes to be represented or not. हाँ

No 1379/58 Name श्यामकुमार उ० सोपन राम

Confined in सक्ति Jail बिलासपुर (म.प्र.)

No. _____ Dated 13-11- 1998

Forwarded to the रजिस्ट्रार महोदय, माननीय उच्च न्यायालय जबलपुर (म.प्र.)

to gether with a copy of judgement or order passed in the case for favour of transmission to the proper Appellate court.

अष्टकांत तिवारी,
जेल अधीक्षक,
जशपुर (म.प्र.)

Superintendent, DISTRICT JAIL, BILASPUR

Jail

Date of receipt in _____ Office _____

Date of receipt of record to accompany the _____

Memo of Appeal to the Appellate court _____

No _____ Dated _____ 199 _____

Forwarded to the

_____

Date of receipt in Appellate court _____

(P. T. O.)

that the Hon'ble Court may kindly suspend the sentence.

12/

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

भामला क्रमांक G.A. 2731/98 सन् ~~300~~

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ.

22-4-2006

Mr. Hanuman Prasad Agrawal counsel for the appellant.

Mr. U.N.S. Deo, Additional Public Prosecutor for the State/respondent.

Oral judgment dictated on *Dais.*

Per L.C. Bhadoo, J: -

By this appeal under Section 374 (2) of the Cr.P.C., through the Superintendent, Central Jail, Bilaspur, appellant Shyam Kumar has questioned legality and correctness of the judgment of conviction and order of sentence dated 30th October, 1998, passed by the Additional Sessions Judge, Jashpurnagar in Sessions Trial No.136/98, whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Sections 302 & 201 of the I.P.C. sentenced him to undergo imprisonment for life and pay a fine of Rs.5,000/-, in default of payment of fine to further undergo S.I. for five years and to undergo R.I. for three years and pay a fine of Rs.1,000/-, in default of payment of fine to further undergo S.I. for nine months, respectively. Co-accused Vasudev was also convicted for commission of offence under Section 201 of the I.P.C. and sentenced to undergo R.I. for three years and pay a fine of Rs.1,000/-, in default of payment of fine to further undergo S.I. for nine months.

Brief facts leading to filing of this appeal are that Ahilya Bai (since deceased) was married to the accused/appellant and there were two children out

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

of the wedlock. Thereafter, the accused ousted Ahilya Bai from his house and even the children were snatched by the accused. Therefore, Ahilya Bai filed some civil litigation against the accused in the Court at Jashpur and as per the prosecution case, Ahilya Bai started working with Bhimanand Nath (PW-3) in order to earn money for litigation. Further case of the prosecution is that on 6-4-98, the accused went to the house of Bhimanand for bringing his wife Ahilya on which Bhimanand asked the accused to enter into a compromise and thereafter only, he will send Ahilya with him. On 7-4-98, a written compromise was entered into and thereafter the accused took away Ahilya with him. When one Ashok Kumar was going to Jashpur from the village of parents of Ahilya, parents of Ahilya asked him to enquire about the well-being of Ahilya, on which he went to Bhimanand and then Bhimanand informed him that accused Shyam Kumar had taken Ahilya with him. Ashok Kumar informed the parents of Ahilya that Ahilya had already been taken by Shyam Kumar, but the whereabouts of Shyam Kumar & Ahilya are not known, on which the parents and grandfather Lal Bahadur (PW-2) of the deceased started searching for Ahilya. On 16-4-98, when Lal Bahadur went towards river Ib searching Ahilya, then he saw that one dog was eating a leg of human being and the body was buried under the sand. His grand daughters Kusmen & Sanmati, after seeing the clothes, said that the clothes are like Ahilya's on which Lohar Sai, uncle of Ahilya, was asked to inform to the Police and he gave the report (Ex.P-5) in Police Station: Kansabel.

Receiving the report (Ex.P-5), the Station House Officer left for river Ib and in presence of Panchas, the body was exhumed and inquest report Ex.P-4 was

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prepared. The compromise deed (Ex.P-3) which was entered between the accused and Ahilya was taken into possession under Ex.P-2 from Bhimanand. Co-accused Vasudev, while in police custody, gave memorandum Ex.P-6 regarding the spade and in pursuance of that, the spade, which was used for burying the body was taken into possession under Ex.P-7. Other articles mentioned in Ex.P-8 were taken into possession from the riverbed. Under Ex.P-9, plain soil and blood stained soil were taken into possession from the place of occurrence. Site plan Ex.P-10 was prepared. The body of Ahilya was sent for post-mortem examination to Primary Health Centre, Farsabahar, where Dr. Smt. Kiran Kerketta (PW-10) conducted post-mortem on the body and prepared the post-mortem report (Ex.P-11). She opined that cause of death is uncertain as the body is excessive putrefied. The case was registered under Ex.P-13 at Police Station: Tapkara. Dehati Nalishi Ex.P-15 was recorded on 17-4-98. Site plans Exs.P-14 & P-16 were also prepared. The First Information Report (Ex.P-17) was registered at Police Station: Kansabel without number and then same was forwarded to Police Station: Tapkara, where regular F.I.R. (Ex.P-13) was registered for commission of offence under Sections 302 & 201 of the I.P.C.

After completion of investigation, charge sheet was filed against Shyam Kumar in his absence as also against Vasudev. The accused persons were arrested on 17-8-98 after filing of charge sheet in the Court of Chief Judicial Magistrate, Jashpurnagar, who in turn committed the case to the Sessions Judge, Raigarh, from where, learned Additional Sessions Judge, Jashpurnagar, received the case on transfer for trial.

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

The prosecution in order to establish charge against the accused persons examined 14 witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied all the evidence or material appearing against them in the prosecution evidence and stated that they are innocent and they have been falsely implicated in the crime.

Learned Additional Sessions Judge after hearing counsel for respective parties, convicted and sentenced the accused persons as mentioned in para 1 of this judgment.

We have heard Mr. Hanuman Prasad Agrawal, learned counsel for the appellant and Mr. U.N.S. Deo, learned Additional Public Prosecutor on behalf of the State/respondent.

Mr. Hanuman Prasad Agrawal argued that in the first place, the prosecution has not been able to establish with legal and clinching evidence that the body which was exhumed from the riverbed of Ib was of Ahilya. Even the clothes based on which the body was said to have been identified were not tendered into evidence and exhibited by the trial Court. No test identification parade was conducted in order to find out that the clothes, which were found on the body, were of deceased Ahilya. He also argued that there is no legal and clinching evidence to show that the accused committed the murder of Ahilya. He further submitted that therefore, the judgment of trial Court is erroneous and the same is liable to be set aside.

On the other hand, Mr. U.N.S. Deo supported the judgment of trial Court.

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Having heard learned counsel for the parties, we have scrutinized the evidence and the judgment of trial Court. It is admitted position that there is no direct and ocular evidence in this case. The whole case rests on the circumstantial evidence. As per the settled law, in order to rest conviction based on circumstantial evidence, it is the duty of the prosecution to establish the following points: -

1. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
2. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
3. the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
4. the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Applying the above principle, we have scrutinized the evidence. The prosecution has tried to connect the accused with the crime based on the following circumstances: -

1. that, the body of Ahilya was identified based on the clothes of the deceased;

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2. that, the deceased was last seen alive on 7-4-98 with the accused just before the commission of crime; and
3. that, the accused absconded just after the commission of crime and he was arrested only on 17-8-98.

First circumstance: -

As far as the first circumstance is concerned, Dr. Smt. Kiran Kerketta (PW-10) has stated in her evidence that on 18-4-98 when she was working in Primary Health Centre, Farsabahar, body of Ahilya was brought to her for post-mortem examination and on external examination, it was found that the body was in putrefied stage. Eye balls were putrefied, mouth closed, skin & muscle detached from the bones over neck, face, upper limb and lower limb. Right lower limb absent from hip joint all over the body. Sand mixed. Body is putrefied so not seen any violent sign over the body. Hair is detached. Time passed since death near about 10 to 12 days. Therefore, from the above evidence, it cannot be said that the body was in identifiable condition. Even in para 1 of her evidence she has not stated that by whom the body was brought and who identified the body.

Now, coming to the question as to whether the body was identified based on the clothes, in the first instance, clothes of the body were not put to test identification parade in order to ascertain that the clothes were of Ahilya. In the second place, even the clothes have not been got exhibited and tendered into evidence. Even Investigation Officer Balbir Singh Rajput (PW-13) has not stated in his evidence that as to how the body was identified. Even he has not referred

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in his evidence regarding the fact that the body was identified on the basis of clothes or that it was in identifiable condition.

Lal Bahadur (PW-2), grandfather of Ahilya, has stated in his evidence that he along with his granddaughters went towards the river in search of Ahilya and when they reached the river, they saw that one dog was eating away the leg of a human being. The body was inside the sand. His granddaughters Kusmen & Sanmati were with him and on seeing the clothes they said that the clothes are like our Ahilya's. Thereafter, he went to the village, informed the villagers and Lohar Sai was sent for lodging the report.

Ratanram Kherwar (PW-1), father of the deceased, and Lal Bahadur (PW-2), grandfather of the deceased, have stated in their evidence that Bhimanand Nath (PW-3) informed them by a letter that Ahilya has been taken by the accused. But, that letter has not been tendered into evidence and both these witnesses have stated that being illiterates, they were not able to read the letter. Therefore, we are of the considered opinion that the prosecution has utterly failed in establishing the fact that the body, which was exhumed from the riverbed, was of Ahilya.

Second circumstance: -

As far as this circumstance is concerned, Bhimanand Nath (PW-3) has stated in his evidence that on 7-4-98 at about 9 a.m. accused Shyam Kumar came and after execution of the compromise deed Ahilya was sent with him, as on enquiry she was willing to go with Shyam Kumar. Bhagwan Tripathi (PW-5) has also stated in his evidence that the compromise deed (Ex.P-3) was written and Ahilya

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was sent with the accused who gave assurance that he would not beat her and he will keep her comfortably. The settled law in respect of last seen theory is that there must be close proximity with the circumstances that the deceased was last seen alive in the company of the accused and crime was committed. In the matter of **BODHRAJ ALIAS BODHA AND OTHERS vs. STATE OF JAMMU AND KASHMIR** reported in **(2002) 8 SCC 45**, the Apex Court held that:

> "the theory of last seen comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."

The Hon'ble Apex Court further held that:

> "It would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together."

In the matter of **Subhash Chand vs. State of Rajasthan** reported in **(2002) 1 Supreme Court Cases 702**, the Apex Court held that;

> ".....To constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of commission of crime...."

Even if the evidence of Bhimanand Nath (PW-3) & Bhagwan Tripathi (PW-5) is accepted, then Ahilya & Shyam Kumar left on 7-4-98, whereas the alleged body was found on 16-4-98. Therefore, there was a gap of nine days. As per the medical evidence, the body, which was exhumed from the riverbed, the death of

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that person, occurred 10-12 days before. But, apart from the above evidence, there is no other evidence which indicates or through which any inference can be drawn that the body was of Ahilya and that too, the accused was the author of the crime in question. As per **Bodhraj's case (supra)**, if there is no other positive evidence to conclude that the accused and the deceased were last seen together at the time of crime, it will be unsafe and hazardous to connect the accused with the crime only on the basis of last seen theory. From the evidence available on record, there is no other conclusive evidence through which an inference can be drawn that the accused after taking away Ahilya committed the murder. Therefore, merely on this circumstance without any other positive evidence, it is difficult to connect the accused with the crime in question.

Third circumstance: -

As far as this circumstance is concerned, the accused by profession is a truck Kalasi, as per his job he is required to move with the truck and he cannot remain at his residence or village. The accused in his statement under Section 313 of the Cr.P.C. denied the prosecution evidence appearing against him. In reply to question No.9 that the body of Ahilya was found on the riverbed, he replied that he does not know what happened to Ahilya, he remains outside. There is no prosecution evidence that the accused disappeared or remained absconded for about four months in order to escape from arrest in the crime in question. Without any positive evidence that the accused deliberately escaped and remain absconded till he was arrested and that merely the accused had not appeared, inference cannot be drawn that he remained absconded in order to escape from

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the crime in question. Therefore, this circumstance has also not been established that the accused absconded in order to escape from the crime.

In view of the foregoing discussion, we are of the considered opinion that the prosecution has utterly failed to connect the accused with crime in question based on the circumstantial evidence and that there is no positive evidence to indicate that the accused was the author of the crime in question and there is no possibility of coming of any third person in between. Therefore, conviction and sentences imposed upon the accused/appellant under Sections 302 & 201 of the I.P.C. cannot be sustained.

In the result, the appeal of accused Shyam Kumar succeeds and the same is allowed. Conviction and sentences imposed upon the accused/appellant under Sections 302 & 201 of the I.P.C. are set side and he is acquitted of said charge. He be set at liberty forthwith, if not required in any other case.

Parties are entitled for certified copy of this order.

Sd/-
L.C.BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge

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